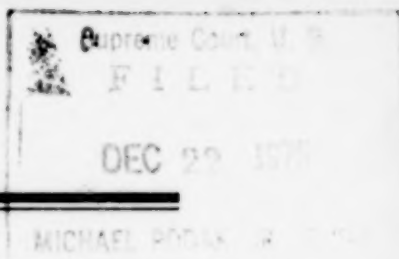


85-812



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

No. 812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

*Petitioners,*

*against*

ELLIOTT H. VELGER,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

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## INDEX

	Page
Preliminary Statement .....	1
The Facts .....	3
The Trial .....	8
Point I, Nothing in the Opinion by the Court of Appeals was contrary to the Roth, Sinderman and the Lombard Decisions. The summary dismissal of Respondent with more than three years of continuous service with the Police Department, City of New York, without stated charges and without a hearing, was in violation of his procedural and substantive rights to due process and the equal protection of the Laws .....	15
Conclusion .....	22
Letter from the City of Plainfield, New Jersey, Police Department .....	23

### Table of Cases

Armstrong v. Manzo, 380 U.S. 545 .....	20
Bell v. Burson, 402 U.S. 535 .....	19,20
Board of Regents v. Roth, 408 U.S. 564 ..	2,3,22
Boddie v. Connecticut, 401 U.S. 371 .....	20
Burton v. Wilmington Parking Authority, 365 U.S. at p. 726 .....	20

INDEX

Cornell v. Higgenbotham 403 U.S. 207, 208 .	19
Fuentes v. Shevin, 407 U.S. 67 .....	19
Goldberg V. Kelley, 397 U.S. 254 .....	19
Lombard v, The Board of Education of the City of New York, 502 F. 2d 631 (1974) cert. denied March 17, 1975 (74-941), 420 U.S. 976 .....	2 17,22
Mullane v. Central Hanover, 339 U.S. 306 ..	20
Perry v. Sinderman. 408 U.S. 593 .....	2 3,22
Sniadach v. Family Finance Corp. 395 U.S. 337 .....	19
Wisconsin v. Constantineau, 400 U.S. 433 ..	19 20

In the  
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DONALD F. CAWLEY, Police Commissioner,  
City of New York, PATRICK V. MURPHY,  
Former Police Commissioner, City of  
New York, THE CITY OF NEW YORK, HARRY  
I. BRONSTEIN, Personnel Director and  
Chairman, New York City Civil Service  
Commission, and ABRAHAM D. BEAME, as  
Comptroller, City of New York,

Petitioners,

- against -

ELLIOTT H. VELGER,

Respondent.

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BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

The luminous decision by Associate Justice  
CLARK, United States Supreme Court (Ret.) sitting  
by designation and concurred in by HAYS and

MANSFIELD, Circuit Judges, did not set forth any new principles of law. *Eo converso*, the Court merely applied the reasoning in BOARD OF REGENTS v. ROTH, 408 U.S. 564; PERRY v. SINDERMAN, 408 U.S. 593, and LOMBARD v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, 502 F. 2d 631 (1974), cert. denied March 17, 1975 (74-941), 420 U.S. 976. Significantly, petitioners brief made no reference to the LOMBARD case and no attempt was made by them to distinguish same. Any such attempt would have been abortive.

The conclusory statement by petitioners that the decision of the United States Court of Appeals for the Second Circuit "represents an unwarranted departure from this Court's comprehensive ruling in BOARD OF REGENTS v. ROTH" \*\*\*, is utterly devoid of any merit. In this connection, Mr. Justice CLARK held:

"In light of the rationale behind both BOARD OF REGENTS v. ROTH,

*supra*, and PERRY v. SINDERMAN, *supra*, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee.\*\*\*".

It is quite obvious, therefore, that the Court below merely applied the principles of law established by this Honorable Court in the ROTH and SINDERMAN cases. There was no departure or deviation.

#### THE FACTS

, Prior to January 30, 1970, the New York City Civil Service Commission advertised an open written competitive examination for the position of PATROLMEN, POLICE TRAINEE, Police Department, City of New York. The Civil service announcement provided as follows



(pp. 22a, 48a-49a):

"This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.

Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without making any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

Respondent successfully passed the written examination and the medical and physical tests. Before he was placed on the eligible list, the Civil Service Commission as required by law investigated respondent's background, school records, employment records, etc., and having found respondent eligible, certified his name as qualified for appointment. The Police Department then conducted its own investigation.

On January 30, 1970, respondent was appointed from the eligible list to the position of Police Trainee (pp. 91a, 48a-49a).

On August 8, 1972, respondent became twenty-one years of age (49a, 91a). On August 15, 1972, respondent was promoted to the position of Patrolman.

On February 16, 1973 with more than three years of continuous service with the Police Department, City of New York, without stated charges and without a hearing, respondent received the following written notice (10a):

"You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

An action was then instituted in this court. In his demand for interrogatories (78a), respondent requested the following information:

"Set forth all the reasons why the Police Department terminated plaintiff on February 16, 1973, inasmuch as plaintiff was continuously employed by the Police Department since January 31, 1970".

In their reply (80a), petitioners stated:

"This interrogatory is objectionable in that plaintiff was employed as a probationary patrolman at the time of his termination and hence has no right to a statement of reasons for his termination".\*\*\*

In response to defendants interrogatories, respondent set forth at length all of the government, state, and city civil service examinations which he took and passed (72a-75a). In his affidavit (40a-44a), respondent set forth in detail his inability to obtain employment in government and in the private sector because of his dismissal from the Police Department. Respondent stated as follows (42a-43a):

"I was terminated by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process".

At the trial in the District Court before Judge WERKER, respondent in detail set forth his inability to obtain employment because of his summary dismissal from the Police Department. Appended herewith is a letter from the City of Plainfield Police Department, New Jersey. Associate Justice CLARK in commenting on respondent's

inability to obtain employment, stated  
(A6):

"Velger's subsequent attempts to secure work included taking over one hundred civil service examinations, of which he passed ninety-seven per cent and scored many high marks. There is every indication that he would have been successful but for the allegations in his New York City Police Department file. In the private sector, he applied for numerous positions, but was ultimately refused employment; again his personnel file seems to have prevented his employment".

#### THE TRIAL

At the trial in the District Court, petitioners produced a Mr. O'BRIEN who was employed as the administrative manager with the New York City Police Department "at present assigned to the Personnel Records Division" (129a). On direct examination, the following testimony was elicited (130a-131a):

- "Q What does the police department do with regard to request for information as to termination?
- A The request for information as to reason for termination is never given out.
- Q To anybody?
- A Other than policy agencies. It has to be a Governmental agency like Park Police, Government Police. If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.
- Q Do they have to have an authorization to obtain that information?
- A Not if it is a Government police agency.
- Q How about if it is a non-Government police agency?
- A The information is not given to them .
- Q Not given to anyone.
- A That's right."



This testimony is extremely significant in view of respondent's testimony that he took over a hundred civil service examinations (109a), and passed the examinations "many of them with high marks" (96a).

Although petitioners witness O'Brien testified that termination records of Police candidates were not made available and were not given to non-Government police agencies, his testimony was not true. To put it mildly, the witness O'BRIEN was "mistaken". The fact is that respondent's records and the derogatory matters contained therein were made available to Penn Central Railroad Station a non-Government agency.

ROBERT J. STEELE called as a witness by respondent, testified he was the Captain of Police, Commanding Officer at Pennsylvania Station, New York, Penn Central Railroad Station Police (111a), and that respondent was terminated because of the

report submitted by LT. LONNIE. HAMILTON (now Captain) of his Staff who inspected and reviewed the Police Department files relating to respondent's termination. The witness further testified that respondent's "personnel evaluation reports were good" (113a).

LONNIE HAMILTON employed as a night Captain with the Penn Central Railroad Police testified that respondent filled out a form which authorized the witness to get his records at the Police Department (115a), and further testified (115a-116a):

"Q Now, first with respect to the quality of his work, working for Penn Central, was it satisfactory?

A So far as I know it was very good."

On the very crucial issue as to the contents of the Police Department records pertaining to respondent's dismissal, Captain HAMILTON testified (117a-119a):



"Q Did he sign it?

A Yes, sir.

Q Then what did you do with it?

A Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his personnel record.

Q You looked through the records?

A Yes, sir.

Q Tell us what was the reason for the dismissal from the Police Department?

A From the New York City Police Department?

Q Yes.

A It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.

Q Other patrolmen?

A Other patrolmen. And supposedly one of the officers reported that Patrolman Velger--

MR. HERZOG: Excuse me. Is this what he said or is this what was in the records?

MR. RESNICOFF: What was in records.

A This is what was in the records, sir.

MR. HERZOG: In the records, all right.

A That patrolman Velger had stuck a service revolver to his head in an apparent attempt to commit suicide.

Q Did they permit you to make copies of the reports or that was not permitted?

A I did not make copies of the reports. I took notes from the file.

Q Then you came back and reported that to your superiors or whoever it was?

A No, sir. I then tried to verify it.

Q You did not try to verify it?

A I tried to verify the information in his service file.

Q And what happened?

A I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter, and I gave up.

Q As a police officer were you satisfied with that report?

A No, sir.

Q They wouldn't permit you to investigate or talk to these other policemen that were involved there, the other probationary patrolmen, is that correct?

A No, they wouldn't permit it. I just drew a blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.

Q Then what happened after that, when you came back to your headquarters?

A After that? I returned to my boss and advised him of my findings, and I told him that under the circumstances I would recommend that Patrolman Velger be terminated.

Q And he was terminated?

A Yes, sir.

MR. RESNICOFF: You may examine."

After looking at the Police Department records, Captain HAMILTON had no choice but to recommend respondent's termination.

POINT I.

NOTHING IN THE OPINION BY THE COURT OF APPEALS WAS CONTRARY TO THE ROTH, SINDERMAN AND THE LOMBARD DECISIONS. THE SUMMARY DISMISSAL OF RESPONDENT WITH MORE THAN THREE YEARS OF CONTINUOUS SERVICE WITH THE POLICE DEPARTMENT, CITY OF NEW YORK, WITHOUT STATED CHARGES AND WITHOUT A HEARING, WAS IN VIOLATION OF HIS PROCEDURAL AND SUBSTANTIVE RIGHTS TO DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

In the notice of termination (10a), petitioners advised respondent he was not being retained because "your capacity having been unsatisfactory to the Police Commissioner." During the course of the oral argument, counsel for petitioners admitted that the reason set forth in the notice was not true. Counsel further conceded if petitioners had set forth in said

Notice that respondent had been terminated because he put his gun to his head in an apparent suicide attempt, it would have been a stigma.

On page 9 of their petition, the statement is made "the plaintiff never denied that he put a gun to his head." That statement of course, is not true. In his affidavit (42a-43a), respondent stated:

""I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file.""

Appellant is twenty-three years of age, single, and resides with his parents (90a). He commenced employment as a Police Trainee on January 30, 1970. His employment with the Police Department was continuous until his summary dismissal on February 16, 1973, which was accomplished without charges and without a hearing (92a).

In LOMBARD v. THE BOARD OF EDUCATION  
OF THE CITY OF NEW YORK, 502 F. 2d 631,

Judge GURFEIN, writing for the U.S. Court of Appeals, Second Circuit, in reversing TRAVIA, J. (E.D.N.Y.) held:

"The distinction taken by this Court in ROTH is that where the appellant's 'good name, reputation, honor, or integrity is at stake' or 'the State, in declining to re-employ (the respondent), imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,' 408 U.S. at 573, he may claim a deprivation of 'liberty' under the due process clause of the fourteenth amendment. A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding. Cf. BIRNBAUM v. TRUSSELL, 371 F. 2d 672 (2d Cir. 1966) (accusation of racial bias)." (emphasis supplied).



Where an adverse action is taken which generates a deprivation of an individual's rights to due process and the equal protection of the laws, such adverse action is unconstitutional.

Any adverse action which seriously affects property rights must be fundamentally fair and rational. It may not be unduly oppressive, unreasonable and in derogation of one's rights to earn a living. Fairness is an element of due process.

The due process clause requires notice and an opportunity to be heard. The constitutional guarantee of procedural due process attaches when there is a governmental deprivation of a legitimate property interest. Once this threshold has been crossed, the opportunity to be heard is constitutionally mandated (see, eg.

Fuentes v. Shevin, 407 U.S. 67; Bell v. Burson, 402 U.S. 535; Wisconsin v. Constantineau, 400 U.S. 433; Goldberg v. Kelly, 397 U.S. 254; Sniadach v. Family Finance Corp., 395 U.S. 337).

Respondent was dismissed from his position of "probationary" Patrolman (10a). Since respondent was a Patrolman, his dismissal gave rise to a stigma of criminality.

Tenure, status, deprivation of a position and wages affect liberty and are property. A Patrolman is a Peace Officer and a Law Enforcement Officer. Dismissal from such a position is a stigma- a disability that will affect the individual's freedom to take advantage of other employment opportunities (Cornell v. Higgenbotham, 403 U.S. 207, 208), and therefore clearly



permits appellant to invoke the panoply of due process procedural protection. Although due process tolerates variances in the form of a hearing (Mullane v. Central Hanover, 339 U.S. 306, and Boddie v. Connecticut, 401 U.S. 371), opportunity for that hearing must be provided before the deprivation at issue takes effect (Bell v. Burson, 402 U.S. 535; Wisconsin v. Constantineau, 400 U.S. 433; Armstrong v. Manzo, 380 U.S. 545 and Burton v. Wilmington Parking Authority, 365 U.S. at p. 726).

The mere existence of the adverse, derogatory and stigmatic report which was available for inspection and review by prospective employers and agencies, operated to the immediate prejudice, damage and detriment of respondent and prevented him from earning a livelihood and securing

comparable employment. What Government law enforcement agency requiring the incumbent to carry a firearm would hire or appoint respondent under the circumstances disclosed? What Government agency would hire respondent in any responsible position? The accusation that a young male twenty-three years of age has suicidal tendencies is a serious charge. It betokens a mental aberrancy. Such an individual is ill and would in all probability erupt under tension, stress and anxiety.

Respondent, a young man twenty-three years of age, should not be compelled to go through the rest of his life carrying the stigma of a suicidal individual.

The decision by Associate Justice CLARK had heart, compassion and understanding. It was a sound legal exposition by a distinguished Judge who displayed an astute perception into the

principles of law enunciated by this Honorable Court in the ROTH and SINDERMAN cases, supra, and LOMBARD v. BOARD OF EDUCATION, supra. The unanimous decision by the SECOND CIRCUIT COURT OF APPEALS was neither a departure nor a deviation from this Court's rulings. There is neither need nor necessity for a review by this Honorable Court.

### C O N C L U S I O N

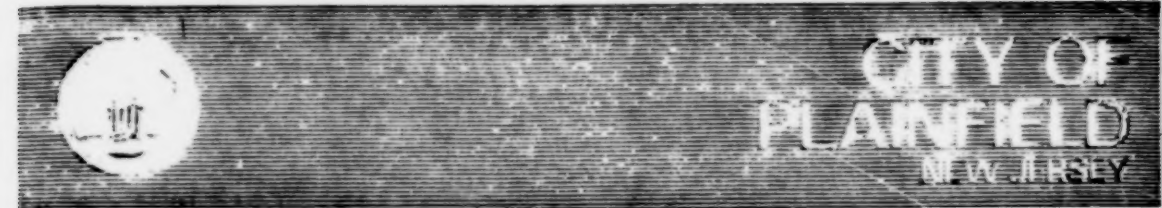
The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

DATED: December 19, 1975.

Respectfully submitted,

SAMUEL RESNICOFF, Esq.,  
Attorney for Respondent.

## LETTER FROM THE CITY OF PLAINFIELD, NEW JERSEY, POLICE DEPARTMENT



POLICE DIVISION

200 East Fourth Street  
(201) 753-3039

June 6, 1974

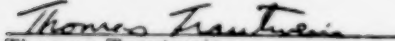
Mr. Elliott H. Velger  
1855 Kennedy Boulevard  
Jersey City, N. J. 07305

Dear Mr. Velger:

You were recently notified by the New Jersey Civil Service Commission that you were certified for a position with the Plainfield Police Division. This is a formality by which Civil Service purges their list of eligible candidates of those who for various reasons have been rejected by this and other agencies.

The Plainfield Police Division has notified the Civil Service of our rejection of your candidacy for the position of Police Officer with this Division. Our commitment in this matter has not changed. We do however, thank you for your interest in the Plainfield Police Division and wish you success in your future endeavors.

Very truly yours,

  
Thomas Trautwein  
Police Officer  
Administrative Bureau

TT/ao